

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GIUSEPPE LUONGO</b>	:	DETERMINATION
	:	DTA NO. 819529
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 2002 through May 31, 2002.	:	

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Petitioner, Giuseppe Luongo, 115 East 57<sup>th</sup> Street, New York, New York 10022, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2002 through May 31, 2002.

The Division of Taxation (“Division”) appearing by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) or petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the notice of determination. Petitioner appeared by Roberts & Holland, Esqs. (Richard Levine, Esq., of counsel). The Division submitted a Notice of Motion and the affidavit of John E. Matthews, Esq., with attachments, including the affidavits of Geraldine Mahon and Daniel LaFar, in support of its motion. Petitioner did not respond to the motion as permitted by November 10, 2003, which date began the 90-day period for the issuance of this determination.

Upon review of the pleadings and the affidavit of John E. Matthews, Esq., with attachments, in support of the Division's motion, Gary R. Palmer, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division is entitled to summary determination on the ground that petitioner's request for a conciliation conference was untimely filed.

***FINDINGS OF FACT***

1. The documents attached to the motion papers filed by the Division include a notice of determination dated November 25, 2002 bearing assessment identification number L021816603. The notice is addressed to petitioner at 157 Milton Road, Rye, New York 10580-3812.

2. The notice informed petitioner that as an officer or responsible person of LSC Restaurant Management Group, Inc., he is liable for sales and use tax due in the sum of \$59,025.33, plus penalty of \$8,929.67 and interest due of \$3,208.01, for a total amount due of \$71,163.01 for the quarter ending May 31, 2002. The notice sets forth, in bold type, the following statement:

NOTE: You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 02/23/03.

3. On April 3, 2003, petitioner's representative filed a request for a conciliation conference with BCMS.

4. On April 18, 2003 BCMS issued to petitioner a conciliation order dismissing request, a copy of which is included in the Division's motion papers, which order reads as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on November 25,

2002, but the request was not received until April 3, 2003, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

5. Petitioner's representative on June 23, 2003 filed a petition for a hearing with the Division of Tax Appeals. The petition stated, "[t]he taxpayer does not recall ever receiving the initial Notice of Determination dated 11/25/02, only the Notice and Demand for Payment of Tax Due dated 3/20/03."

6. The Division served its answer to the petition on or about August 27, 2003, wherein it asserted that the *petition* was filed more than 90 days from the date the notice was issued and that the burden of proof was on petitioner to show that the assessment is erroneous or otherwise improper.

7. Also included in the Division's motion papers are the affidavits of Geraldine Mahon and Daniel LaFar, and the one-page certified mail record that is alluded to in each affidavit. The affidavit of Ms. Mahon identifies her as the Principal Clerk of the Case and Resource Tracking System ("CARTS") Control Unit of the New York State Department of Taxation and Finance who supervises the processing of statutory notices, including notices of determination.

8. Daniel LaFar is employed in the Department's Mail Processing Center as a Principal Mail and Supply Clerk, a position he has held since 1978. Mr. LaFar is fully familiar with the operations and procedures of the Mail Processing Center. His duties include the supervision of the Mail Processing Center staff responsible for the delivery of outgoing mail to the post office.

9. The Mahon and LaFar affidavits describe the general procedures for the preparation and mailing of statutory notices, including notice of determination number L021816603, mailed to petitioner at 157 Milton Road, Rye, New York 10580-3812 on November 25, 2002.

The general process for issuing and mailing statutory notices began with the computer generation of the notices and a listing of the taxpayers to whom such notices were to be sent by certified mail on a particular day, hereinafter referred to as the certified mail record (“CMR”). A discrete certified control number was assigned to each of the two notices listed on the CMR. In this case certified control number 7104 1002 9739 0138 5998 was associated with notice number L021816603, which certified control number appears on the CMR. The CMR also includes certified control number 7104 1002 9739 0138 6001 which is associated with a copy of the same notice of determination, but which was mailed to petitioner’s prior representative, Vincent Paolucci, CPA, whose address, as listed on the CMR, is 200 Madison Avenue, Suite 2200, New York, New York 10016. Each statutory notice was placed in an envelope by a machine which then sealed the envelopes and weighed and placed postage and fee amounts thereon. This machine was operated by an employee of the Mail Processing Center. Another Mail Processing Center employee then delivered the sealed envelopes and the CMR to a branch of the United States Postal Service (“USPS”) in the Albany, New York area. The CMR for the notices mailed on November 25, 2002 consists of one page which included petitioner’s name and address and Mr. Paolucci’s name and address as well as other pertinent information. These two items of certified mail addressed, respectively, to petitioner and his representative were delivered to the USPS on November 25, 2002 by a Mail Processing Center employee.

10. A USPS employee affixed a postmark identifying the Colonie Center branch of the USPS to the CMR. The date on this USPS postmark is November 25, 2002. The USPS employee circled the printed number 2 on the CMR and wrote his or her name on the CMR as well. A Mail Processing Center employee specifically requested that the receiving USPS

employee either circle the total number of pieces of mail received at the post office or indicate that number by writing it on the CMR. In this case the USPS employee circled the number 2 on the CMR to acknowledge receipt of two pieces of certified mail on November 25, 2002. A USPS employee returned the CMR to a Mail Processing Center employee who, in turn, delivered the CMR to the CARTS Control Unit to be maintained as a permanent record in the regular course of that Unit's business.

11. The Division included in the documents presented in support of its motion a copy of petitioner's joint New York State and City of New York Resident Income Tax Return for the year 2001. Petitioner's address on this return is 157 Milton Road, Rye, New York 10580. Petitioner's signature on this 2001 return is dated October 7, 2002.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

12. The Division contends that because petitioner filed his request for a conciliation conference more than 90 days after the notice of determination was issued, the Division of Tax Appeals lacks jurisdiction to convene a hearing on the merits and, as a consequence, there are no triable issues of fact and the Division's motion for summary determination should be granted.

13. Petitioner did not file a response to the Division's motion, but in his petition for a hearing he denied any recollection of having received the notice of determination.

#### ***CONCLUSIONS OF LAW***

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material

issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. The Division claims that it is entitled to summary determination in its favor with regard to the notice of determination at issue because petitioner failed to file a timely request for a conciliation conference or a timely petition for a hearing before the Division of Tax Appeals. Tax Law § 1138(a)(1) authorizes the Division to estimate tax due and to issue a notice of determination to a taxpayer if a return required under Article 28 is not filed, or if a return, when filed, is incorrect or insufficient. Pursuant to this paragraph, after 90 days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in the

notice together with the interest and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such 90-day period applied to the Division of Tax Appeals for a hearing. As an alternative to filing a petition for a hearing with the Division of Tax Appeals, a taxpayer may file a request for a conciliation conference with BCMS. The time period for filing such request is also 90 days (Tax Law § 170[3-a][e]; 20 NYCRR 4000.3[c]). The filing of a petition or a request for a conciliation conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division has the burden to establish that it properly mailed the statutory notice at issue to the taxpayer at his last known address (*Matter of Perk*, Tax Appeals Tribunal, December 13, 2001).

C. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of proving proper mailing rests with the Division (*Matter of Novar TV & Air Conditioning Sales & Service, Inc.*, Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

D. Where the Division has denied a taxpayer a conciliation conference on the ground that the request was not timely, the Division is required to establish when it mailed the notice of determination (*Matter of Novar TV & Air Conditioning Sales & Service, Inc., supra*). The required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of Perk, supra*).

E. As to notice of determination number L021816603, the affidavits of Geraldine Mahon and Daniel LaFar set forth sufficient proof to establish the Division's standard procedure for issuing such notices. The affidavits demonstrate that, as each notice is generated, a discrete certified control number is assigned to each notice. In the process, a CMR is generated which lists the names and addresses of the taxpayers to whom notices are to be issued on a particular date, the assessment numbers of those notices and the corresponding certified control number of each listed notice. Next, the Division established that its standard procedure was followed on November 25, 2002 in the generation and mailing of notice number L021816603 to petitioner and his then representative. Specifically, the Mahon and LaFar affidavits, together with the CMR, show the total number of pieces of mail received by the USPS to be two, while the post mark on the CMR establishes the November 25, 2002 date of mailing. The number 2 is circled on the CMR. The significance of the circled number 2 is explained by Mr. LaFar in terms of the Mail Processing Center's having requested that the receiving postal employee indicate the total number of pieces of mail received by the USPS by either circling the number of pieces received or by writing that number on the last page of the CMR. After the receiving postal employee has



signed or placed his or her initials on the last page of the CMR, then the entire document serves as the acknowledgment of receipt by the USPS of the number of pieces of mail circled or written on the last page of the CMR. Accordingly, and consistent with the reasoning in *Matter of Roland*, (*supra*), the Division has established that notice of determination number L021816603 was mailed to petitioner on November 25, 2002, at 157 Milton Road, Rye, New York 10580-3812 by certified mail, and a copy of said notice was likewise mailed to the representative, Vincent Paolucci, CPA, at 200 Madison Avenue, Suite 2200, New York, New York 10016 on the same date.

F. Demonstrating that a notice was addressed and mailed to petitioner at petitioner's last known address is an important element in the Division's proof of mailing (*Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Toward this end, the Division included in its motion papers a copy of petitioner's 2001 Resident Income Tax Return, form IT-201. Petitioner's 2001 IT-201 bore as a mailing address 157 Milton Road, Rye, New York 10580. The date of petitioner's signature on this 2001 return is October 7, 2002.

The Division is entitled to rely upon the address on the last return filed by the taxpayer unless the taxpayer clearly informs the Division that he wishes the address of record to be changed (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). On November 25, 2002, the date the Division mailed the notice of determination to petitioner, the last income tax return filed by petitioner was his 2001 personal income tax return which was signed by him on October 7, 2002. The notice of determination mailed by the Division on November 25, 2002 was mailed to petitioner's then last known address.

G. Petitioner, in his petition for a hearing, denied having any recollection of the receipt of the notice of determination. Where the Division has proven it mailed the notice by certified mail to the taxpayer's last known address and that of his representative, such mailing gives rise to presumptive evidence of receipt of the notice by the persons to whom it is addressed (Tax Law § 1147[a][1]). Once the Division has introduced sufficient evidence to enable it to obtain a presumption of receipt of the notice by the petitioner and his representative, the burden is then on the petitioner to rebut that presumption by introducing evidence of nonreceipt (*Matter of Huggins*, Tax Appeals Tribunal, April 8, 1999). Mere denial of receipt will not suffice to rebut the presumption of receipt (*Matter of T.J. Gulf, Inc. v State Tax Commission*, 124 AD2d 314, 508 NYS2d 97). The Division is under no obligation to prove actual receipt by the petitioner and the representative of the notice (*Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). Petitioner has not met his burden to present evidence sufficient to prove nonreceipt of the notice.

H. Because the request for a conciliation conference was not filed within 90 days of the issuance by the Division of the notice of determination, the Division of Tax Appeals lacks jurisdiction to consider the petition on its merits.

I. The petition of Giuseppe Luongo is dismissed.

DATED: Troy, New York  
January 22, 2004

/s/ Gary R. Palmer  
ADMINISTRATIVE LAW JUDGE